

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GAYLIN LYNN BURLESON,

No. C 05-1263 SI (pr)

Petitioner,

**ORDER DENYING REQUEST FOR  
STAY AND ABEYANCE**

v.

SCOTT KERNAN,

Respondent.

Petitioner has requested a stay of the proceedings in this habeas action so that he may return to state court to exhaust state court remedies as to a new claim he wants this court to consider. The new claim he wants to assert is that he was denied his right to a jury trial in connection with certain sentence enhancements and the restitution order. Respondent has opposed the request, arguing that a stay is inappropriate because the claim sought to be exhausted is meritless.

A district court may stay a mixed habeas petition to allow the petitioner to exhaust his unexhausted claims in state court. Rhines v. Webber, 544 U.S. 269, 277-78 (2005). In Rhines, the Court discussed the stay-and-abeyance procedure for mixed habeas petitions. Rhines cautioned district courts against being too liberal in allowing a stay because a stay works against several of the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in that it "frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings" and "undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition." Rhines, 544 U.S. at 277. A stay and

1 abeyance "is only appropriate when the district court determines there was good cause for the  
2 petitioner's failure to exhaust his claims first in state court," the claims are not plainly meritless,  
3 and there are no intentionally dilatory litigation tactics by the petitioner. Id. at 277-78.  
4 Burleson's request falters under the Rhines requirements.

5 Burleson was sentenced to 40 years to life. The jury found true the allegations that  
6 Burleson had suffered a 1971 murder conviction, a 1983 robbery conviction and a 1985 robbery  
7 conviction. He received a 25-to-life sentence based on the jury's findings that he had suffered  
8 prior convictions for the murder and two robberies. He also received three 5-year enhancements  
9 for his prior convictions based on findings made by the judge.

10 In the new claim he wants to assert, Burleson relies on a line of Supreme Court cases that  
11 started with Apprendi v. New Jersey, 530 U.S. 466 (2000). The rule from that line of cases is  
12 that, "under the Sixth Amendment, any fact that exposes a defendant to a greater potential  
13 sentence [than the statutory maximum] must be found by a jury, not a judge, and established  
14 beyond a reasonable doubt, not merely by a preponderance of the evidence." Cunningham v.  
15 California, 127 S. Ct. 856, 863-64 (2007). The relevant statutory maximum "'is not the  
16 maximum sentence a judge may impose after finding additional fact, but the maximum he may  
17 impose without any additional findings." Id. at 860 (quoting Blakely v. Washington, 542 U.S.  
18 296 303-04 (2004)).

19 Staying this action while Burleson exhausts the claim is not appropriate because the claim  
20 appears plainly meritless, see Rhines, 544 U.S. at 277, and he will be unable to show that an  
21 eventual rejection of it by the state court would be contrary to or an unreasonable application of  
22 clearly established federal law, as set forth by the Supreme Court. Burleson's claim runs into  
23 the problem that the statutory maximum for his crime is life imprisonment because he was  
24 sentenced under California's Three Strikes law. See CT 3157 (defendant was sentenced pursuant  
25 to California Penal Code § 667(b)-(I) or § 1170.12). The claim he wants to pursue concerns the  
26 minimum number of years he must serve on that life sentence before he is eligible for parole.  
27 Nothing in the judge's determinations of the sentence enhancements will cause Burleson's  
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1 sentence to extend beyond the life maximum to which he was sentenced and for which he may  
2 be imprisoned based on the third strike conviction. That the Appendi line of cases does not  
3 apply is evidenced by the fact that an indeterminate sentencing scheme is one of the proposed  
4 solutions to the jury trial problems caused by determinate sentencing schemes the Court has  
5 invalidated. See, e.g., Blakely, 542 U.S. at 305 (citing with approval Williams v. New York, 337  
6 U.S. 241 (1986) (judge's consultation of facts outside the trial record to decide whether to  
7 sentence defendant to death did not violate the jury trial right because the indeterminate  
8 sentencing scheme allowed the judge to sentence the defendant to death or imprisonment)); see  
9 also id. at 332 (Breyer, J., dissenting) (noting that one of the alternatives to Guidelines-type  
10 sentencing scheme is indeterminate sentencing, such as California's former system). In Blakely,  
11 the Court explained that indeterminate sentencing that gives a judge greater judicial power to  
12 set the sentence does not infringe on the province of the jury: "It increases judicial discretion,  
13 to be sure, but not at the expense of the jury's traditional function of finding the facts essential  
14 to the lawful imposition of the penalty. Of course, indeterminate schemes involve judicial  
15 factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems  
16 important to the exercise of his sentencing discretion. But the facts do not pertain to whether  
17 the defendant has a legal right to a lesser sentence—and that makes all the difference insofar as  
18 judicial impingement upon the traditional role of the jury is concerned." Blakely, 542 U.S. at  
19 308-09. Furthermore, to the extent Burleson's argument depends on an overruling of existing  
20 Supreme Court precedent, see Request For Stay, Exh. A, pp. 22-24 (arguing that Almendarez-  
21 Torres v. United States 523 U.S. 224 (1998), was wrongly decided), his prospects for success  
22 under 28 U.S.C. § 2254(d) are especially bleak.

23        Staying this action while Burleson exhausts state court remedies is not appropriate for the  
24 separate reason that Burleson has not shown good cause for this failure to exhaust his claim first  
25 in state court, see Rhines, 544 U.S. at 277. Burleson is trying to pursue a claim known to him  
26 since 2000. He alleged in his motion for new trial on March 30, 2000, that the element of force  
27 had not been submitted to the jury on the murder and two robberies, the enhancement could not  
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1 be imposed. See CT 3083. Although he initially cast it as an insufficient evidence claim, in an  
2 April 20, 2000 response to the prosecution's opposition, Burleson asserted a denial of his right  
3 to a jury trial on prior conviction sentencing enhancement allegations. See CT 3147-3150. This  
4 is the same claim he is trying to raise seven years later.

5 Burleson's efforts to urge that his claim gained life only after the U.S. Supreme Court  
6 decided Cunningham v. California, 127 S. Ct. 856 (2007), are unpersuasive. Cunningham dealt  
7 with a part of California's sentencing law (i.e., the sentence triad of lower/middle/upper terms)  
8 not at issue in the present case. In Cunningham, the Court held that California's determinate  
9 sentencing law ("DSL") violated the Sixth Amendment because it allowed the sentencing court  
10 to impose an upper term sentence based on aggravating facts that it found to exist by a  
11 preponderance of the evidence. Id. at 860, 870-71. The court was directed under the sentencing  
12 law to start with a "middle term" and then move to an "upper term" only if it found aggravating  
13 factual circumstances beyond the elements of the charged offense. Id. at 862. Concluding that  
14 the middle term was the relevant statutory maximum, and noting that aggravating facts were  
15 found by a judge and not the jury, the Supreme Court held that the California sentencing law  
16 violated the rule set out in Apprendi. Id. at 871. Burleson's sentence was not chosen from the  
17 lower/middle/upper term triad but instead was an indeterminate term. In other words, because  
18 he was a repeat offender with sentence enhancement allegations pertaining to his prior  
19 convictions, he was sentenced under a different part of the California sentencing law than that  
20 invalidated in Cunningham. In no way did he need to wait for Cunningham to be decided to  
21 assert the claim he now wants to exhaust. The fact that Cunningham was the first in the  
22 Apprendi line to address a California sentence does not matter: the Supreme Court will not do  
23 fifty decisions to address the sentencing schemes in each of the fifty states so a prisoner cannot  
24 claim a need to wait until the Supreme Court tackles the sentencing laws in that particular  
25 prisoner's state. In sum, Cunningham did nothing to advance Burleson's position or to enable  
26 him to argue a claim that had theretofore been barred.

1 For the foregoing reasons, petitioner's request for a stay and abeyance is DENIED.  
2 (Docket # 27.)

3 IT IS SO ORDERED.

4 DATED: November 15, 2007

  
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SUSAN ILLSTON  
United States District Judge